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No. 87-577

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1987

ARDEN A. ANDERSON, *et al.*,
Petitioners,

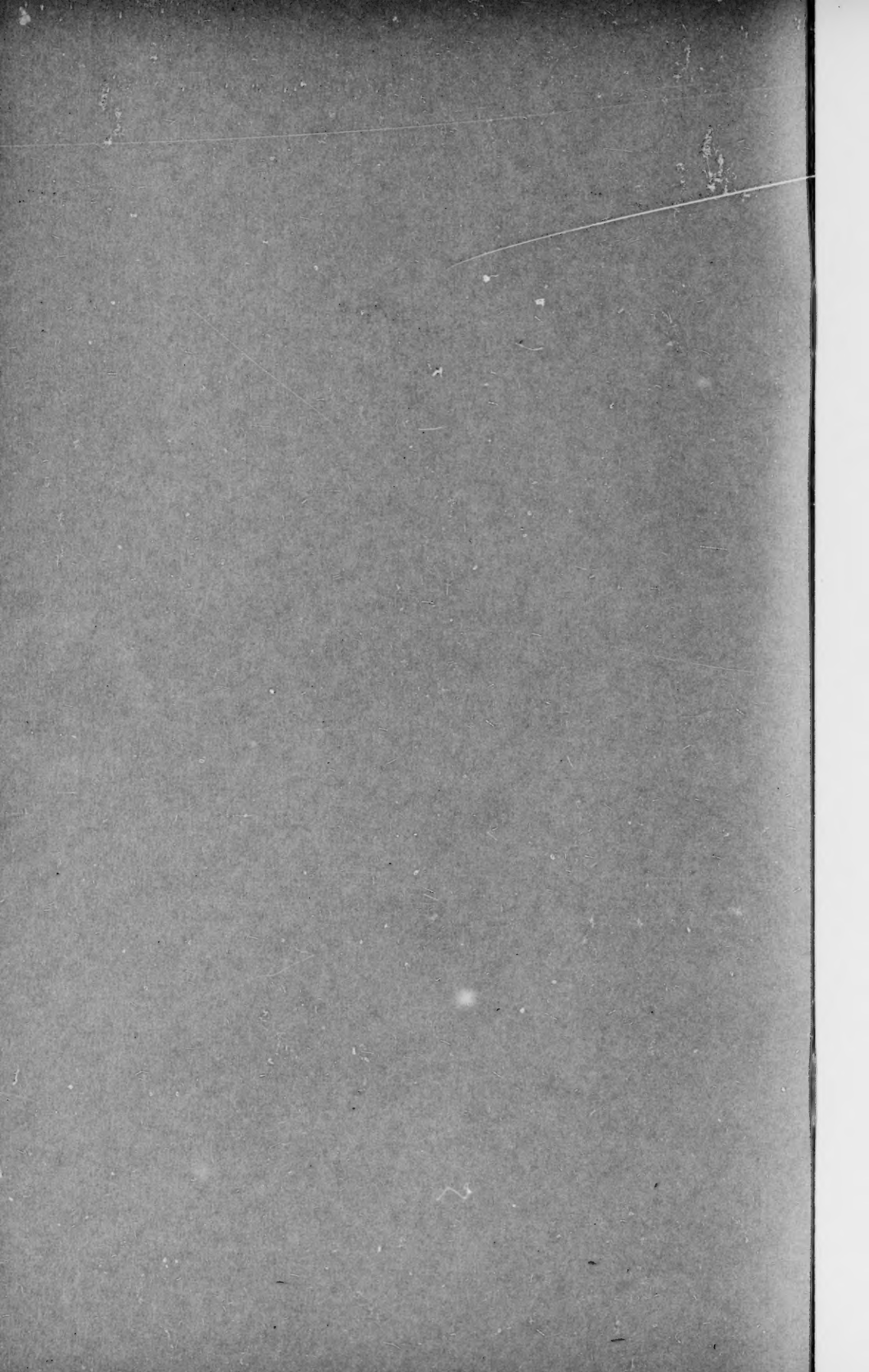
vs.

THE STATE OIL AND GAS BOARD OF ALABAMA, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court of Civil Appeals of Alabama correctly affirm the orders of the State Oil and Gas Board of Alabama, when the Court of Civil Appeals held that the Board provided petitioners with constitutional due process with respect to pretrial discovery?

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COUNTER-STATEMENT OF THE CASE

Petitioners' Statement of the Case contains many important omissions and inaccuracies that must be corrected to give a complete Statement of the Case.

For the general background in this case, we incorporate by reference the facts set out in the decision of the Court of Civil Appeals of Alabama. *State Oil and Gas Board of Alabama v. Anderson*, 510 So. 2d 250 (Ala. Civ. App. 1987) (Appendix A to petition for certiorari, pages A-1 to A-13).

The Court of Civil Appeals of Alabama reversed the Circuit Court of Mobile County on January 14, 1987, and affirmed the orders of the State Oil and Gas Board (hereinafter referred to as "the Board") unitizing the Hatter's Pond Field in Mobile County, Alabama. The Court of Civil Appeals remanded the case to the Circuit Court with instructions to enter an order affirming the orders of the Board. The Court of Civil Appeals denied applications for rehearing. The Alabama Supreme Court denied petitions for writ of certiorari.

In their Statement of the Case, petitioners totally ignore the commencement of the case, crucial early hearings, and the first order of the State Oil and Gas Board addressing the unitization of the Hatter's Pond Field. The proceedings were commenced on May 31, 1982, when Getty Oil Company (hereinafter referred to as "Getty") filed a petition requesting the unitization of a portion of the Hatter's Pond Field, a gas condensate reservoir covering approximately 14 square miles, so that enhanced recovery operations

could be implemented for wells in the proposed unit area. (R. 100001).¹

At the initial hearing on the Getty petition, the Board continued the proceedings and required that all mineral interest owners within the field limits be notified of the hearings, although their lands did not lie within the proposed unit area. (R. 200053).

Thereafter, the Board conducted over 13 days of hearings before it issued Order No. 83-170. The most controversial issue during the hearings was the allocation formula to be used for distributing revenues derived from unit production. Petitioners and other parties participated in this "first" set of hearings. In their Statement of the Case, petitioners ignore the fact that they actively participated in these "first" hearings and that they failed to file any discovery requests. During these "first" hearings petitioners took the position that the Board should reject the allocation formula proposed by Getty, a formula based 100% upon pore volume. Petitioners suggested the Board adopt a formula that included

¹Initially oil and gas wells are drilled and produced under primary operations, that is, from natural energy in the reservoir. After wells in the reservoir have produced under primary operations for a length of time, they will cease to produce at a commercial rate unless enhanced recovery operations, or pressure maintenance operations, are initiated. Approval of the unit operations or unitization in accordance with the oil and gas conservation statutes, is a prerequisite for initiating enhanced recovery operations. *Ala. Code* § 9-17-80 et seq. (1975); H. WILLIAMS & C. MEYERS, *MANUAL OF OIL AND GAS TERMS* 569 (5th ed. 1981).

"R." represents the record of the State Oil and Gas Board.

well production or "productivity" as a factor in the formula. At no time during the "first" hearings did petitioners make any requests for discovery or any requests for subpoenas to be issued for purposes of discovery. Neither petitioners nor any other party made any objections relating to discovery. In fact, at the conclusion of the hearings, petitioners submitted a brief to the Board that included the following statement:

The Board's authority in issuing an order relating to the matter of the unitization of the Hatters Pond Field is not limited to the simple approval or disapproval of the Getty proposal. The Board's authority in fashioning an order is broad enough to permit it to "take such action with regard to the subject matter thereof as it may deem appropriate," see Section 9-17-7(f). The subject matter in question is the unitization of the Hatters Pond Field. . . . The Board should neither take the easy way out by simply approving the Getty proposal or simply denying it and letting the matter languish. The Board must afford the direction indicated by these hearings and the order it presently enters. (R. 101715).

Thus, at the conclusion of the "first" hearings during which the allocation formula was at issue, petitioners asserted that the Board had sufficient authority and evidence before it to exercise its jurisdiction and issue a ruling in the matter. On July 29, 1983, the Board did exercise its jurisdiction and authority, issuing Order No. 83-170. In its petition for certiorari,

petitioners ignore these prior hearings in which they participated without filing any discovery requests and which resulted in an order by the Board resolving most of the issues raised. In Order No. 83-170, the Board rejected the allocation formula proposed by Getty, and the Board approved for the Hatter's Pond Unit an allocation formula based 60% on pore volume and 40% on productivity defined as a tract's average daily production as determined from a well's best month of production on the tract. (R. 100750).

On February 10, 1984, Getty filed a petition requesting the Hatter's Pond Field to be unitized in accordance with Order No. 83-170. Although petitioners had made no requests for discovery during the "first" hearings, they made various discovery requests during the "second" hearings. Getty provided the parties with vast and extensive production of documents and data. The very few requests that were denied were filed with the Board after the commencement of the hearings. (R. 101420). Despite the untimeliness of the discovery requests, the only information that was not provided to petitioners was core studies, seismic data and economic evaluations concerning certain wells.

A number of issues were raised by various parties in these "second" hearings. Anderson, et al., raised the issue during these "second" hearings that certain wells and tracts in the Hatter's Pond Unit were not in pressure communication with other wells and tracts in the Unit. Although numerous fieldwide bottom hole pressure surveys had been conducted on wells in the Hatter's Pond Unit prior to the unitization

hearings, Anderson, et al., petitioned the Board to order additional fieldwide bottom hole pressure surveys in order to determine the nature of communication in the field.

The Board conducted 10 days of hearings and, on October 9, 1984, the Board issued Order No. 84-382 granting Getty's Petition.

Concerning the issue raised by petitioners, the Board found, based upon overwhelming geologic and engineering evidence, that all tracts included in the Hatter's Pond Unit are underlain by a single fieldwide reservoir having communication among all wells and tracts and that all tracts in the Unit will benefit from secondary recovery (petition for certiorari, pages A-51, A-65). Further, the Board denied the petition by Anderson, et al., for additional bottom hole surveys because the evidence presented clearly showed that bottom hole pressure surveys were inaccurate and unreliable for use in the Hatter's Pond Unit and, therefore, would be wasteful and would serve no useful purpose. (*Id.* at pages A-53, A-54, R. 101444).

On February 7, 1985, Getty filed a petition requesting that the Board enter an order finding that Getty had obtained 75% approval of the plan of unitization as required by the Alabama oil and gas conservation statutes. A hearing was held on this petition on March 29, 1985, and on April 9, 1985, the Board issued Order No. 85-63 finding that the plan of unitization set forth in Order No. 84-382 had been ratified by the 75% as required by statute, and directed that unit operations in accordance with

Order No. 84-382 be commenced on May 1, 1985. (R. 101835).

During all these hearings, the Board acted in accordance with its duty to protect all parties' constitutional rights of due process. The Board called prehearing conferences prior to the commencement of hearings at which parties presented their positions and made exhibits available to other parties. The Board required all exhibits to be prefiled. The Board allowed all interested parties to participate in the hearings in any manner they wished.

There is a vast amount of information and data available at the Board's offices for public review in preparing for hearings. For example, well logs, cores or core chips, core analyses, cuttings, production reports, production tests, pressure tests, and other records are available for public review. The information constitutes the essential data base and was available for all parties and their experts to review and analyze in order to prepare for the hearings.

REASONS FOR DENYING THE WRIT

I. There is no substantial federal question arising under the United States Constitution raised in the petition for writ of certiorari.

The federal question raised by petitioners whether the Board provided procedural due process to the parties is utterly insubstantial. Petitioner contends "this case presents an opportunity for the U. S.

Supreme Court to define the due process rights of administrative litigants in the areas of prehearing discovery and the compulsion of production." (petition for certiorari, page 13). This is an enormous overstatement of the significance of this case. Neither the Board nor the Court of Civil Appeals of Alabama ever held there was no right to discovery. In fact in its orders, the Board expressly stated:

[A]lthough there are no formal discovery procedures set out in the regulations of the Board, the policy of the Board is to provide all parties before it with a full and fair hearing. The policy of the Board is not to deny reasonable requests for discovery; however . . . the discovery requests of [petitioners] are unreasonable, untimely, will result in waste, and will not protect the coequal and correlative rights of all the mineral interest owners in the proposed Hatter's Pond Field Unit." (petition for certiorari, page A-72).

Virtually all discovery requests filed by petitioner during the Board hearings were produced. In denying the few discovery requests that were not produced, the Board clearly acted within its discretion, and on appeal the Court of Civil Appeals affirmed the Board's orders. In this case, the administrative agency (Board) did not deny that there was a constitutional right to discovery, and the agency (Board) did not deny the right to prepare adequately for administrative hearings. The agency (Board) simply held that certain few requests for discovery

were due to be denied under the relevant circumstances.

This case, in which the administrative agency (Board) so clearly acted to protect the parties' rights of procedural due process, is not a case in which the United States Supreme Court should grant certiorari and address the question of discovery.

By granting certiorari in this case the United States Supreme Court would simply be reviewing the same facts before the Board, which were subsequently reviewed by the Court of Civil Appeals, to determine under those specific facts and circumstances whether the Board violated petitioners' rights of procedural due process. In the decision below, the Court of Civil Appeals of Alabama reviewed a record containing over 20,000 pages, studied lengthy briefs, heard oral argument on all issues, and prepared a comprehensive and thorough decision in which it held there to be no procedural due process violation. The United States Supreme Court has stated that it will not exercise jurisdiction to decide a question which turns solely upon an analysis of the particular facts. *E.g., United States v. Johnston*, 268 U.S. 220 (1925). As the United States Supreme Court stated in *Berenyi v. Immigration Service*, 385 U.S. 630, 636 (1967): "This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues." This principle is particularly applicable to this case. The decision whether the Board acted correctly in denying certain discovery requests turns on the particular facts in the case. The Court of Civil Appeals of Alabama has

scrutinized the facts in detail and determined there to be no due process violations; the United States Supreme Court should not grant certiorari to review those same facts.

This Court has stated that certiorari is due to be denied when "the question [is] of importance merely to the litigants and [does] not present an issue of immediate public significance." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). A decision by the United States Supreme Court would be limited to the facts in this case; the case simply does not present the basis for a far-reaching, momentous decision of general public significance by the United States Supreme Court.

In this case where the orders of the Board and the decision of the Court of Civil Appeals indicate a thorough knowledge and understanding of the facts and issues, the United States Supreme Court should defer to the state with respect to the state administrative agency, the administrative experts, and the state's appellate court system.

II. The Court of Civil Appeals of Alabama correctly affirmed the orders of the State Oil and Gas Board of Alabama when the Court of Civil Appeals held that the Board provided petitioners with constitutional due process with respect to pretrial discovery.

There was voluminous discovery during the hearings before the Board, and petitioners received virtually everything they requested. The few items

requested and not ordered produced were requested after the "second" hearings had commenced. Despite the untimeliness of the discovery requests, the only information Getty did not make available was core studies, seismic data and economic evaluations concerning certain wells.

In their petition for certiorari, petitioners purport to state the circumstances of their discovery requests, but they rather conveniently ignore certain facts of which the Court of Civil Appeals was cognizant when it affirmed the orders of the Board. In denying the very few items not produced, the Board was cognizant of the following facts: (1) the untimeliness of the requests, that is, the requests were made to the Board *after* the commencement of the "second" set of hearings, with some of the requests being filed months after the hearings began; (2) the determination that the information requested was not necessary to determine the issue before the Board; (3) the cumulative nature of the requests; (4) the need for unit operations to commence as soon as possible in order to prevent loss of valuable natural resources of Alabama; (5) the Board's statutory duty to prevent waste and to protect correlative rights;² (6) the fact that the Board provides a vast amount of material that is available as a public record to all parties to

²Section 9-17-2 of the *Code of Alabama* (1975) provides as follows: "The prevention of waste of oil and gas and the protection of correlative rights are declared to be in the public interest. The purpose of [the Alabama oil and gas conservation statutes] is to prevent such waste and to protect correlative rights."

review; for example, cores, core analyses, well logs and production reports; (7) the admission by petitioners' own geologic witness that he failed to study much of the pertinent information that was available as a public record; (8) the knowledge of the Board's staff of experts that seismic data requested had no usefulness in this particular case and that seismic data are customarily treated in the industry as proprietary and confidential; and (9) the prehearing conferences and prefilings of exhibits, which allowed all parties the opportunity to be adequately prepared for the hearings. The Court of Civil Appeals was undoubtedly aware of all these facts and circumstances when it affirmed the orders of the Board.

Petitioners and other parties in the hearings relating to the unitization of Hatter's Pond Field clearly received that information and discovery to which they would have been entitled in the trial courts of Alabama.

There is a well-established judicial principle governing pretrial discovery: the administrative agency or the trial court has administrative or judicial discretion to determine whether a discovery request is proper, and the agency or court is reversed only for abuse of discretion. *E.g., Harden v. Adams*, 760 F. 2d 1158 (11th Cir. 1985), *cert. denied*, 474 U.S. 1007 (1985). In its review of the orders of the Board, the Court of Civil Appeals of Alabama held that " 'the denial of prehearing discovery [in an administrative proceeding] as applied in a particular case' could result in a due process violation. Thus, we must

examine whether the Board's denial of [petitioners'] discovery requests did in fact result in a denial of procedural due process. . . . We have examined the record and are satisfied that it did not." *State Oil and Gas Board of Alabama v. Anderson*, 510 So. 2d 250, 256, (Ala. Civ. App. 1987). In its decision, the Court of Civil Appeals of Alabama reviewed the specific facts relating to the discovery requests and affirmed the orders of the Board.

With respect to procedures used in administrative hearings, the United States Supreme Court has held that "the requirements imposed by the guaranty [of due process of law] are not technical, nor is any particular form or procedure necessary." *Inland Empire Council v. Millis*, 325 U.S. 697, 710 (1956).

This Court has held that a person attacking an order of an administrative agency "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *FPC v. Hope Gas Co.*, 320 U.S. 591, 602 (1944). The Court of Civil Appeals affirmed that the Board's orders were just, fair and reasonable and protected the procedural due process of the parties.

The decision of the Board providing for the unitization of the Hatter's Pond Field was ultimately approved and ratified by over 97% of the working interest owners and by over 75% of the royalty interest owners in the Unit. The Hatter's Pond Field Unit was established and enhanced recovery operations commenced thereby preventing waste of hydrocarbon resources and protecting correlative rights of all mineral interest owners.

In their petition, Anderson, et al., intimate that the decision of the Court of Civil Appeals of Alabama is erroneous because petitioners' substantive due process rights have been violated. We note that the early oil and gas conservation statutes adopted by oil and gas producing states and orders issued pursuant to those statutes were frequently challenged as allowing the unconstitutional deprivation of property without due process. The United States Supreme Court and numerous state appellate courts have rejected these arguments and have upheld such oil and gas conservation statutes and orders as a valid exercise of the state's police power. *E.g.*, *Hunter Co. v. McHugh*, 320 U.S. 222 (1943); *Bandini Co. v. Superior Court*, 284 U.S. 8 (1931); *Patterson v. Stanolind Oil and Gas*, 77 P. 2d 83 (Okla. 1938).

Summarizing a number of its decisions on this subject, the United States Supreme Court has stated:

We have held that a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landowners of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment.

Hunter Co. v. McHugh, 320 U.S. 222, 227 (1943).

Simply stated, the principal reason for denying the petition for writ of certiorari is that the State Oil and Gas Board of Alabama and the Court of Civil Appeals of Alabama were just, fair and correct in their orders.

The orders of the State Oil and Gas Board providing for the unitization of the Hatter's Pond Field protect procedural due process and substantive due process rights under the United States Constitution. The decision of the Court of Civil Appeals of Alabama affirming the orders of the Board unitizing the Hatter's Pond Field is due the deference accorded it.

CONCLUSION

For the reasons stated, the petition for writ of certiorari is due to be denied.

Respectfully submitted,

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